IN THE

Supreme Court of the United States

..... TERM, 19.....

No. .....

EARLE E. KYNETTE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITIONER'S BRIEF.

Nature of Action.

This is an action seeking a writ of certiorari directed to the Supreme Court of the State of California, commanding said Supreme Court of California to certify to this Court a complete transcript of the record and its decision and proceedings in the case known as People of the State of California v. Earle E. Kynette, *et al.*, criminal number 4289, to the end that this Honorable Court may review said record, decision, and proceedings and ascertain whether your petitioner has been denied a right or privilege guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Where the Case May be Found.

The case which is the subject of this petition may be found in the official reports of the Supreme Court of the State of California. A correct and authentic copy of the opinion of the State Supreme Court is contained in the transcript of record filed herewith.

Statement of the Case.

Your petitioner was subpoened to appear before the grand jury of Los Angeles County. Your petitioner appeared before the grand jury in response to said subpoena. Your petitioner was sworn as a witness. Your petitioner was advised by the district attorney that under the Constitution of the United States he was not compelled to testify and had a right to assert a privilege against self-incrimination. Your petitioner, acting upon this advice, declared that he did not desire to testify and was excused from the grand jury room. The grand jury indicted your petitioner. Your petitioner at his trial in the Superior Court of this State, took the stand and gave exculpatory testimony in his own behalf as a party defendant. The district attorney was allowed by the trial court, over objection, to introduce evidence establishing the fact that your petitioner had asserted a constitutional right and had claimed the privilege against self-incrimination when he appeared before the grand jury. At the conclusion of the case, the trial court on its own motion formally charged the jury that such evidence (of your petitioner's claim of privilege before the grand jury) could be con-

sidered by the jury as discrediting the exculpatory testimony your petitioner gave at the trial on his own behalf.

Your petitioner was convicted and sentenced to imprisonment in the state penitentiary. Your petitioner appealed to the District Court of Appeal of the State of California. The District Court of Appeal decided in its opinion that evidence of petitioner's claim of privilege before the county grand jury had been improperly introduced at his trial and that your petitioner had been denied his constitutional guarantee against self-incrimination. The Appellate Court reversed the lower court and ordered a new trial be had. The State, as respondent, then petitioned the Supreme Court of this State to hear the case. The Supreme Court of the State of California granted the petition and took the case of your petitioner under consideration. The Supreme Court of the State of California wrote a decision reversing the District Court of Appeal and approving the action of the trial court in allowing the introduction into evidence of your petitioner's claim of privilege as previously asserted before the county grand jury for the purpose of discrediting petitioner as a witness.

Your petitioner applied to the Supreme Court for a rehearing on this matter, which application was denied.

The facts of the case are set forth in greater detail in the petition for writ of certiorari filed herewith.

POINTS AND AUTHORITIES.

I.

The Constitution of the State of California Guaranteed to Your Petitioner Protection Against Self-Incrimination When He Appeared Before the Los Angeles County Grand Jury.

Since the 1934 amendment to Section 13, of Article I of the Constitution of the State of California, the jury may consider a defendant's failure to explain or deny by his testimony at the trial any evidence or facts in the case against him and this whether the defendant testifies or not.

This special constitutional amendment applied only to a trial and did not affect that portion of the constitutional provision which guaranteed that no person shall be compelled to give evidence against himself under penalty in any occasion other than at the actual trial itself.

Constitution of the State of California, Art. I, Section 13, Amendment of 1934.

> "Over the objection of the defendant, the people were allowed to show the questions thus asked of O'Bryan before the grand jury and his answers thereto. This testimony should not have been admitted. The course pursued was in violation of the constitutional right of every person not to 'be compelled, in any criminal case, to be a witness against himself'. (*Const. Cal.*, Art. 1, Sec. 13.) The defendant could not, of course, have been called and required to testify against himself at the trial. The guaranty against being so compelled would be of little value if the same result could be attained by the indirect method of compelling him to testify at some antecedent step of the proceedings against him,

and then offering in evidence his statements so extracted."

People v. O'Bryan, 165 Cal. 55; 130 Pac. 1042, 1044.

II.

The Use as Evidence at Your Petitioner's Trial the Fact of His Prior Claim of Privilege When He Appeared Before the Grand Jury That Indicted Him in Effect Absolutely Destroys the Privilege.

"It would indeed be strange if the law should confer upon a witness this right as a privilege, and at the same time should permit the fact of his availing himself of it to be shown as a circumstance against him. It certainly is a privilege of very doubtful character if the effect of claiming it is as prejudicial to the witness as the effect of waiving it."

State v. Bailey, 6 N. W. 589 (Iowa).

III.

Evidence Tending to Impeach a Party Defendant to an Action Such as Your Petitioner Tends to Discredit the Whole Range of Facts Asserted in Petitioner's Plea of Not Guilty and in the Testimony Relied on by Him.

"The witness speaks in court through his testimony only, and hence his testimony forms the sole basis upon which the inconsistency of his other statement is predicated. But the party opponent, whether he himself takes the stand or not, speaks always through his pleadings and through the testimony of his witnesses put forward to support his pleadings; hence, the basis upon which may be predicated a discrediting inconsistence on his part includes the whole range of facts asserted in his pleadings and in the testimony relied on by him."

Wigmore, Vol. II (2d Ed.), p. 504, Sec. 1, Par. 1048 (Extra judicial admission.)

"While the general rule with reference to statements made by a witness which are inconsistent with the testimony of the witness is that such statements may be considered for the purpose only of reflecting upon the credibility of the witness, such rule does not wholly apply when the witness is a party to the action. Any statement so made by a party to an action may be considered, not only for the purpose of impeachment, but as an admission against interest as well."

Gates v. Pendleton, 236 Pac. 364 at 366 (Calif.).

IV.

Where a Party to an Action Has Been Imposed Upon by Misrepresentation or Fraud to His Detriment, Such Party Should be Restored to the Rights and Position He Held and Occupied Before He Was Imposed Upon.

State v. Height, Book 59 L. R. A. 437, at p. 444.

V.

The Rule Against Requiring a Witness to Give Self-Incriminating Evidence in Any Judicial Proceeding Is Based Upon a Principle of Humanity and Rests Upon the Law of Nature. It Has Become so Firmly Imbedded in Our System of Jurisprudence That it Cannot be Denied to a Party in a Criminal Proceeding Without Denying to That Party Due Process of Law.

Boyd v. United States, 116 U. S. 616;

Counselman v. Hitchcock, 142 U. S. 547, at 565;

Brown v. Walker, 161 U. S. 591, at 596;

Bram v. United States, 168 U. S. 533, at 545.

Conclusion.

The foregoing points and authorities support your petitioner's contention as asserted in his petition.

He appeared before the Los Angeles County grand jury under compulsion. He was there officially informed he had a constitutional right to refuse to give testimony that might tend to incriminate him. He was not informed that if he did so the fact of such a lawful refusal could be used to discredit him when he testified at his trial. The decision of the Supreme Court of this State in approving such a proposition as here presented is in derrogation of every fundamental principle of fair dealing and justice to a subject accused of a penal offense. The State constitutional guarantee to all was made inapplicable to his case by the decision of that Court.

To guarantee a right to a defendant in a criminal case and then render the assertion of that right a detriment is a denial of due process of law.

Petitioner prays that the judgment of the Supreme Court of the State of California be reversed.

Respectfully submitted,

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Of Counsel.